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No. 90-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IN RE WILLIAM M. KUNSTLER,

Petitioner,

v.

JOE FREEMAN BRITT, *et al.*,

Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF BENJAMIN R. CIVILETTI, *ET AL.*, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Benjamin R. Civiletti, Philip H. Corboy, John J. Curtin, Jr., Sanford Levinson, Ronald L. Olson, Michael E. Tigar, and William O. Whitehurst, Jr. move this Court for leave to file the accompanying Brief Amicus Curiae in Support of Grant of Petition for Certiorari.

Grounds For This Motion

Counsel for Respondents have stated to Amici's Counsel of Record, Michael E. Tigar, that they do not oppose amici filing this brief, but that they cannot "consent" to such filing. Accordingly, this motion is necessary.

Amici have wide experience in litigation, public service, bar association activities and law teaching. They wish to draw the Court's attention to reasons for granting certiorari that are additional to those in the petition itself. The "interest of the amici" discussion below shows that amici have a vital professional interest in, and broad professional experience with, the issues presented by the petition.

Interest of the Amici

Amici are, in alphabetical order:

Benjamin R. Civiletti was Attorney General of the United States, and Chair of the Section of Litigation of the American Bar Association [ABA], and is a Fellow of the American College of Trial Lawyers, and an attorney in private law practice.

Philip H. Corboy was Chair of the Section of Litigation of the ABA, and is a Fellow of the American College of Trial Lawyers and an attorney in private practice.

John J. Curtin, Jr., is President of the American Bar Association, was Chair of the Section of Litigation of the ABA, and is a Fellow of the American College of Trial Lawyers and an attorney in private practice.

Sanford Levinson is McCormick Professor of Law at the University of Texas School of Law, and teaches and writes in the field of professional responsibility and the legal profession.

Ronald L. Olson was Chair of the Section of Litigation of the ABA, and is a Fellow of the American College of Trial Lawyers and an attorney in private practice.

Michael E. Tigar holds the Joseph D. Jamail Centennial Chair in Law at the University of Texas School of Law and was Chair of the Section of Litigation of the ABA.

William O. Whitehurst, Jr. was President of the State Bar of Texas and is an attorney in private practice.

Amici appear in their individual capacities, and not on behalf of any firm or organization. Their qualifications and backgrounds are only partially summarized above. They hold differing views on the attorney conduct that is the basis of this matter, but all of them agree that the issues are important and worthy of this Court's review on certiorari. They believe that the exponential growth in the number and size of Rule 11 and related sanctions poses a distinct challenge to the legal profession.

CONCLUSION

For the foregoing reasons, amici respectfully request that they be permitted to appear in this matter and that the accompanying brief be filed.

Respectfully submitted,

/s/ Michael E. Tigar

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BRIEF AMICUS CURIAE OF BENJAMIN R. CIVILETTI, *ET AL.*, IN SUPPORT OF GRANT OF THE PETITION FOR CERTIORARI

Although this brief is filed in No. 90-802, amici understand that the other attorneys sanctioned in the case below, 914 F.2d 507 (4th Cir. 1990), as well as those involved in *Blue v. Department of the Army*, 907 F.2d 525 (4th Cir. 1990), decided the same day by the same court, will seek review here. Amici believe that granting review in all of these cases will provide a richly-detailed record suitable for mapping some procedural limits on Rule 11.

REASONS FOR GRANTING THE WRIT

This Case Presents Serious and Recurring Rule 11 Procedural Issues

A. Background and Context of Rule 11

Rule 11, originally based on old federal Equity Rule 24, was amended in 1983 to broaden the signing attorney's obligation and the district judge's power.[1] It supplements the power of courts under 28 U.S.C. § 1927 to sanction those who vexatiously multiply litigation, and the limited powers available under 18 U.S.C. § 401, the general contempt statute. See also F.R.Crim.P. 42 (contempt procedure).

The 1983 Advisory Committee's prediction that "a greater range of circumstances will trigger . . . violation" than under the former rule has proven to be (probably unintentional) understatement. "The large number of reported opinions . . . can only be a fraction of the large number of instances in which sanctions have been imposed." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986). See generally C. Shaffer & P. Sandler, eds., Sanctions: Rule 11 and Other Powers (2d ed. 1987) (published by the ABA Section of Litigation).

B. Appellate Review and the Need for Procedural Standards

This Court has held that a district judge's imposition of sanctions is reviewable for abuse of discre-

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[1] For some background, see generally Risinger, Honesty in Pleading and Its Enforcement: Some 'Striking' Problems with Federal Rule of Civil Procedure 11, 61 Minn. L. Rev. 1, 8-14 (1976). See also Advisory Committee Notes to 1983 Amendment to Rule 11.

tion, a standard that affords the district court substantial deference. *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S.Ct. 2447, 2457-61 (1990). Compare *Thomas v. Capital Sec. Serv., Inc.*, 835 F.2d 866, 873 (5th Cir. 1988) (en banc) abuse of discretion).

Given the potential impact of sanctions on lawyers' lives and reputations—not to mention clients' ability to obtain representation—the existence of a relatively unreviewable sanction discretion obviously poses substantial risks. In this case, the petition presents two means of curbing those risks while serving whatever proper purposes Rule 11 may possess.

These issues may, we suggest, be summarized as "timing" and "fair hearing." Because broadening the scope of review, at least in most Rule 11 cases,[2] is an unlikely event, the best means to guide district court discretion is formulation of clear procedural rules. This case presents an opportunity to advance that process.

"Fair Hearing: Summary Procedures Increase the Risks of Misapplying Rule 11

The petition discusses the wisdom of the district court hearing evidence before deciding contested issues of fact with which she is not otherwise familiar. Amici would add that this Court should consider some salutary analogies to the principles at stake here.

The contempt power, F.R.Crim.P. 42, can be exercised summarily only if the district judge "saw" or

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[2] When first amendment issues are at stake in a Rule 11 context, it can be argued that the standards of Bose Corp v. Consumers' Union of America, 466 U.S. 485, 499 (1984), should apply.

"heard" the misconduct, and then only under stringent limitations. See generally *Harris v. United States*, 382 U.S. 162 (1965). The reach of summary contempt has been curbed, even when exercised by state court judges. See generally *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974); *Taylor v. Hayes*, 418 U.S. 488 (1974).

Yet, as the petition notes, several courts of appeals have omitted to formulate a standard of adversary inquiry for disputed sanction findings. No doubt many sanction cases involve conduct the district judge saw or heard. This case, in sharp contrast, turns on motivations, credibility and the meaning of events that were never the subject of an evidentiary hearing of the kind normally expected in our system of justice before a court orders one party to pay the other a substantial sum of money, and makes findings that seriously damage reputations.

It is also relevant, we believe, that this case was filed against public entities and officials and involved allegations of constitutional violation. In awarding sanctions, the district judge found that the lawsuit was filed "for publicity, to embarrass state and county officials, . . . to intimidate those involved in prosecution . . . " These are serious allegations, but they raise serious questions about the procedural means by which they were found to be true.

The underlying lawsuit did not seek judicial adjustment of ordinary private rights. It invoked constitutional protection, and was thus an exercise of the right of petition. Compare *Eastern R.R. Presidents' Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

The potential chill of Rule 11 is particularly great in a case such as this. Avarice may drive a lawyer to misconduct when the monetary stakes are high. These lawyers came into these cases with no prospect of financial reward. Their clients and their supporters were no doubt unpopular with local and state officials, the more so because a federal jury had acquitted Hatcher and Jacobs. The lore of litigators is flecked with stories of lawyers who have come forward in cases of this kind. Their willingness to come forward has brought significant cases to this Court in almost every decade of our national history.

Timing: Rule 11 and the Return of Professionalism

For lawyers concerned, as we are, with restoring the profession's faded image, timing and notice provisions are crucial.

As the Fifth Circuit has suggested in other language, Rule 11 should not be a means for one side to "sandbag" the other. *Thomas*, supra, 836 F.2d at 880. Permitting a lawyer to run up fees and costs, and then to move for sanctions for having been "forced" to bestir himself, would encourage the sort of ambush justice that the Federal Rules in general, and amended Rule 11 in particular, were designed to end.

The "ambush" or "sandbag" issue is related to, but broader than, the potential procedural bar raised in Question One of the petition. A Rule 41(a)(2) dismissal, based on defendants' unqualified consent, is a procedural hour at which notice of impending sanctions should logically be given. But the principle behind such a determination is broader, resting upon the indisputable need for more lawyer cooperation in resolving contested litigation issues.

In *Hartmarx*, 110 S.Ct. at 2457, this Court doubted that the framers of Rule 11 intended "lengthy delay" between the alleged misconduct and imposition of sanctions.

Deterrence of lawyer misconduct is Rule 11's laudable, "central goal of deterrence," 110 S.Ct. at 2454. But every judicial act in a civil proceeding must heed the F.R.Civ.Proc. 1 admonition that the rules are to "be construed to secure the just, speedy, and inexpensive determination of every action." That goal cannot be achieved if Rule 11 is interpreted to encourage "satellite litigation". Compare *Hartmarx*, 110 S.Ct. at 2460.

The petition suggests that a consented Rule 41(a)(2) dismissal, without reservation of a right to move under Rule 11, should preclude the allegedly aggrieved party. Such a view would surely draw a bright line for advocates and judges alike. At this stage, we simply urge that fair warning is a central concern, whether the requirement be found in the rules' text or in broader prudential considerations.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition should be granted.

Respectfully submitted,

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